

APR 28 2004

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

MB Docket No. 02-92  
RM-10363

United Communications Corporation (“United”), licensee of station WWNY-TV, Channel 7, Carthage, New York, by counsel, hereby petitions the Media Bureau for reconsideration of its Report and Order in the above-styled proceeding. Notice of the Report and Order was published in the *Federal Register* on March 29, 2004 (69 FR 16172). Accordingly, this petition is timely.

The Report and Order allotted DTV Channel 7 to Albany, New York over the objections of United and of the American Broadcasting Companies, Inc. ("ABC"), licensee of WABC-TV, Channel 7, New York City, in order to accommodate the wishes of Clear Channel Broadcasting Licenses, Inc. ("Clear Channel"), licensee of WXXA-TV, Albany. The original DTV allotment paired with the NTSC allotment occupied by WXXA-TV was DTV Channel 4. Unfortunately, the Report and Order lacks even a cursory nod towards the public interest, much less a reasoned analysis that the substitution of DTV Channel 7 for DTV Channel 4 at Albany is in the public interest. This is contrary to the requirements of Section 307(b) of the Communications Act of 1934, as amended (the "Act").

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As ABC has pointed out in its Petition for Reconsideration, Clear Channel claimed that its suggested change to the DTV Table of Allotments would reduce interference to video cassette recorders and reduce impulse noise in its DTV signal. Only after United and ABC demonstrated conclusively that such claims of technical superiority of a Channel 7 allotment at Albany were specious did Clear Channel argue that with a change to DTV Channel 7, WXXA-DT would be able to co-locate its DTV facilities with those of WNYT-DT, Channel 12. This, Clear Channel posited, would result “in appreciable cost savings . . . . Thereby speeding the initiation of DTV service to the Albany area.” (Clear Channel reply comments, at 2.) This argument in favor of the requested change was first raised in Clear Channel’s reply comments. As new matter coming at a phase where opposing parties had no opportunity for rebuttal, the Bureau should have ignored it. Instead, the Bureau apparently based its reasoning on this new matter, and found that the suggested change was a “reasonable business judgment.”

What might be Clear Channel’s “reasonable business judgment” is not necessarily in the public interest. The public interest is supposed to be paramount in the Bureau’s decision making. Because the Report and Order contains no finding that this change to the DTV Table of Allotments is in the public interest, the Bureau should revisit this matter and reject the proposed channel substitution.

The Commission has specifically rejected the proposition that a licensee’s desire to minimize construction costs constitutes an acceptable reason to delay DTV station construction, except where a licensee can demonstrate genuine financial hardship. The specific standard is set forth in *Review of the Commission’s Rules and Policies Affecting*

*the Conversion to Digital Television*, 16 FCC Rcs 20594, 20610-12, at para. 46 (2001). Cost is only a factor where financial hardship is fully documented.

The showing presented by Clear Channel falls far short of meeting that standard, even if it were proper to submit it in reply comments. It is noteworthy that Clear Channel, in its application for an extension of time to construct WXXA-DT (File No. BEPCDT-20020222ABD), did not allege that a change in channel assignment would result in "appreciable cost savings" and, thus, speed station construction. Rather, Clear Channel has successfully used this rule making proceeding to extend the time for station construction. In essence, this is based on an excuse, namely cost savings, that would not have been valid in its application for extension of time. By raising the cost savings issue in the context of this rulemaking rather than in the extension application, Clear Channel has apparently been able to escape spending any money at all on DTV station construction during the period when United and other licensees have had to spend very considerable funds building and operating DTV facilities with no return on that investment. As the result of the device of this channel allotment proceeding, Clear Channel will likely be able to delay construction until the time when enough DTV sets will have been purchased so that there will be an economic justification for implementation of its DTV permit.

In this proceeding, the supposed cost savings have not been adequately documented, even assuming that moving extra money to Clear Channel's already ample bottom line is an adequate justification for interference to reception of WWNY-TV and other affected stations. Moreover, the proponent of the change to Channel 7 has not

balanced the relative costs and benefits of the change. Clearly the real cost savings to Clear Channel is not in the changed channel assignment, but rather in a simple delay in incurring construction costs for the station. Clear Channel has been able to invest its considerable funds elsewhere, and that is the “appreciable cost savings” here. In the meantime, digital service to Albany is pushed to the side.

Section 307(b) of the Act requires the Commission make a fair, efficient and equitable distribution of broadcast channels among the several states and communities. Implicit in this standard is a requirement that fairness is a public interest concept and not a matter of savings or construction budgets by Clear Channel as opposed to revenue lost by other licensees due to losses in viewership. It is axiomatic in this field that it is the right of viewers that is paramount, and not that of licensees.

Virtually all of the Commission’s changes to the DTV Table of Allotments contain the phrase “the public interest would be served...” by the proposed change (e.g., Fargo, North Dakota, DA-04-374 (Feb. 19, 2004); Portland, Maine, DA 04-265 (Feb. 11, 2004); Corpus Christi, Texas, DA 03-3641 (Nov. 19, 2003). *Contra*, Asheville, North Carolina and Greenville, South Carolina, DA 03-2479 (Aug. 1, 2003); Miami, Florida, 17 FCC Rcd 22677 (2002); Reno, Nevada, 16 FCC Rcd 16163 (2001). No such finding appears in the Report and Order in the instant proceeding. That is for the good reason that it is not possible, in the record of this proceeding, to find that the proposed change is in the public interest when the perceived benefits are weighed against the costs of this change.

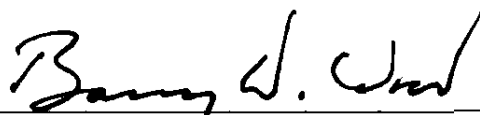
United showed, in its original comments, that the projected interference to reception of its signal by the public is not *de minimis* in a genuine sense. To any household

that loses a unique service, the loss of that service is not a *de minimi* event. In order to rectify the costs Clear Channel's plan will inflict on the public, the Bureau should treat Clear Channel's "cost savings" as of *de minimis* significance in the context of the public interest, and should reject the proposed substitution of DTV Channel 7 for DTV Channel 4 at Albany.

Respectfully submitted,

**UNITED COMMUNICATIONS  
CORPORATION**

By: \_\_\_\_\_



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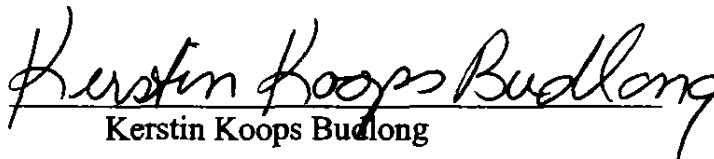
Dated: April 28, 2004

## AFFIDAVIT OF SERVICE

I, Kerstin Koops Budlong, hereby certify that on this date I caused the foregoing "Petition for Reconsideration" to be served by first class mail, postage pre-paid, on the following:

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